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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY PEREZ, Defendant and Appellant.	D072943 (Super. Ct. No. JCF36287)

APPEAL from a judgment of the Superior Court of Imperial County, L. Brooks Anderholt, Judge. Affirmed and remanded for resentencing.

Dacia A. Burz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Michael D. Butera, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Perez appeals his jury-tried convictions for assault with a deadly weapon (Pen. Code,[1] § 245, subd. (a)(1), count 1), second degree robbery (§§ 211, count 2), and resisting, delaying, or obstructing a peace officer (§ 148, subd. (a)(1), count 3). After finding that Perez had two prior strikes, the court sentenced him to prison for 25 years to life.

On appeal, Perez contends that the court gave incomplete instructions on antecedent assault, which was the basis of his self-defense claim. In the event we determine that the court had no sua sponte duty to give an additional antecedent assault instruction, and to avoid forfeiture of the issue on appeal, Perez contends his attorney's failure to request such an instruction constituted ineffective assistance. Perez also contends the court abused its discretion by denying his *Romero*[2] motion.

We reject Perez's contentions; however, the matter must be remanded for resentencing because the record does not indicate that the court sentenced Perez on counts 2 and 3.

FACTUAL BACKGROUND

A. *The People's Case*

Perez was walking in a department store parking lot where he encountered L.R., who was walking towards the store. L.R. had his phone and wallet in one hand, and his car keys in the other. Perez blocked L.R.'s path and asked him for money. When L.R.

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1 Undesignated statutory references are to the Penal Code.

2 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

refused, Perez tried to grab L.R.'s wallet. L.R. turned and tried to ran away, but Perez grabbed his right hand. During the struggle, Perez took a box cutter out of his pocket, opened it, and slashed L.R. in the neck. L.R. grabbed Perez's arm, trying to get the knife away from him. Perez told L.R. not to scream, and demanded L.R.'s wallet. L.R. threw his wallet on the ground, and when Perez ran after it, L.R. escaped to his car, where he called police.[3]

Perez fled on foot. L.R. followed in his car, keeping police informed of Perez's location. A police helicopter located Perez hiding behind some trash cans. Perez surrendered after officers threatened to unleash a police dog to effectuate the arrest. Police found a box cutter and three box cutter blades in Perez's pocket, along with contents of L.R.'s wallet.

The prosecutor played a surveillance video of the incident for the jury. The grainy video shows Perez approaching L.R., and L.R. trying to get away. However, the point at which Perez cut L.R.'s neck is not visible in the poor quality video.

B. *Defense Case*

Perez testified in his own defense. At the time of these offenses, he was 29 years old and had been homeless for several months. Perez admitted that he was convicted of residential burglary in 2009 and robbery in 2010.

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[3] The boxcutter's blade extends about one-inch. L.R.'s neck wound was 1.5 inches long and 0.7 inches high.

Perez testified that he was panhandling—asking for money—in the parking lot that evening. He had not eaten anything since morning and was trying to get money to buy food before a nearby restaurant closed.

Perez admitted approaching L.R. and asking him for money. Perez testified that he was "talking with [his] hands" while L.R. was "backing away." Perez testified that when he "got a little bit close," L.R. pushed him and "eventually we started wrestling." Perez denied trying to take anything from L.R. and testified that he was just trying to get away.

Perez testified that in 2009, when he asked a younger person for money, the person smashed his head against the pavement, sending Perez to the hospital. Perez testified that when L.R. "reacted physically," Perez thought "about what happened in 2009," and he became scared, fearing that L.R. would assault him, so he swung the box cutter at L.R. to get away. He testified that after breaking free from L.R., he "really wasn't thinking" and "just grabbed" L.R.'s wallet.

C. *Jury Instructions on Self-Defense*

On the issue of self-defense, the court instructed the jury with CALCRIM No. 3406 (mistake of fact), in part as follows:

> "The defendant is not guilty of assault with a deadly weapon and/or robbery if he did not have the intent or mental state to commit the crime because he reasonably did not know a fact or reasonably or mistakenly believed a fact.
>
> "If the defendant's conduct would have been lawful under the facts as he reasonably believed them to be, he did not commit assault or armed robbery.

> "If you find that the defendant believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully and if you find that belief was reasonable, he did not have a specific intent or mental state required for assault and/or robbery."

The court also instructed with CALCRIM No. 3470 (self-defense), in part as follows:

> "Self-defense is a defense to assault with a deadly weapon. The defendant is not guilty of that crime if he used force against the other person in lawful self defense. The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger. [¶] . . .
>
> "When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. [¶] . . .
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> "If you find that the defendant received a threat from someone else that he reasonably associated with [L.R.], you may consider that threat in deciding whether the defendant was justified in acting in self defense."

D. *Verdicts*

After deliberating for about one hour, the jury returned guilty verdicts on all three counts.

DISCUSSION

I. *THE COURT PROPERLY INSTRUCTED ON SELF-DEFENSE*

A. *Introduction—Perez's Contention*

In some circumstances, prior threats or assaults may be relevant in determining whether a defendant acted in self-defense. Antecedent threats or assaults may "illuminate and reflect on the reasonableness of defendant's perception of both the imminence of danger and the need to resist with the degree of force applied. [Citation.] They may also justify the defendant 'in acting more quickly and taking harsher measures for her own protection . . . .'" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1094.)

Perez claims that when L.R. pushed him, he feared that L.R. was like the person who in 2009 assaulted him while panhandling. Because of that prior assault, Perez claimed that he reasonably believed that he had to defend himself with the boxcutter when L.R. appeared to attack in response to his aggressive panhandling.

Perez acknowledges that the court instructed the jury with a bracketed portion of CALCRIM No. 3470 dealing with antecedent assault, as follows: "If you find that the defendant received a threat from someone else that he reasonably associated with [L.R.], you may consider that threat in deciding whether the defendant was justified in acting in self defense." However, Perez contends that this instruction only informs about whether Perez had a reasonable belief in the *necessity* for self-defense, and failed to explain that an antecedent threat also impacts the "manner of force" needed to respond to the perceived threat. Although Perez's trial counsel did not ask for any additional instructions, Perez contends that the instruction given was "only partially correct, and

thus incomplete, ambiguous and misleading . . . ." He asserts that the court had a sua sponte obligation to also instruct that "one who has been harmed . . . by a person other than the victim is justified in acting more quickly and taking harsher measures for his own protection in the event of an assault either actual or threatened, than would be a person who had not received such threats provided the person receiving the threats reasonably associated the victim with those threats."

B. *Analysis*

A trial court is obligated "to instruct sua sponte 'on those general principles of law that are closely and openly connected with the facts before the court and necessary for the jury's understanding of the case.'" (*People v. Simon* (2016) 1 Cal.5th 98, 143.) However, instructions that "relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case" must be given if requested and supported by the evidence, but need not be given sua sponte. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

An instruction on the effect of antecedent threats or assault on the reasonableness of asserted self-defense conduct is "analogous to a clarifying instruction" and therefore a "specific point" rather than a "general principle of law." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 489 (*Garvin*).) Accordingly, a trial court has no obligation to instruct on antecedent threats or assaults on its own. (*Id*. at pp. 488-489.) Therefore, the court did not err by failing to give the additional instruction that Perez urges.

Anticipating this result, Perez contends that even where the court has no sua sponte duty to instruct, a court that undertakes to instruct must do so correctly. Perez asserts that the self-defense instruction given is "ambiguous whether the effect of the

antecedent threat and assaults on [Perez] by someone he reasonably associated with the victim also reasonably justified [Perez] [in] reacting quicker and taking harsher measures in self-defense than would otherwise appear reasonable."

CALCRIM No. 3470, as given, instructed the jury on basic principles of self-defense, informing the jury that self-defense requires a reasonable belief in imminent danger and the use of reasonable force. The court also instructed that if the jury found Perez was assaulted by someone he "reasonably associated" with L.R., the jury could "consider that threat in deciding whether [Perez] was justified in acting in self-defense." The court further instructed that when deciding these issues, the jury should "consider all the circumstances as they were known to and appeared to [Perez] . . . ." Furthermore, the court instructed the jury that if Perez's beliefs were reasonable, "the danger does not need to have actually existed."

Contrary to Perez's assertion, these instructions are not ambiguous or incomplete. The court instructed the jury to consider "*all* the circumstances" (italics added) as they appeared to Perez and told the jury that Perez was entitled to use the amount of force that a reasonable person would believe is necessary "in the same situation." "[A]ll the circumstances" includes the circumstances of the 2009 assault. Moreover, to find Perez "justified" in acting in self-defense, the jury would necessarily have to consider the reasonableness of the force used, including whether, in light of the 2009 assault, it was reasonable for Perez to react quicker and take harsher measures in self-defense than might otherwise appear reasonable. Furthermore, in closing argument, Perez's lawyer called the jury's attention to CALCRIM No. 3470 and used that instruction to argue the

very point he urges here—telling the jury that Perez had been "assaulted in 2009 by a young man who had taken offense to him panhandling, it was a vicious assault," and Perez "didn't want to end up in that situation again. . . . [U]nder Mr. Perez's state of mind at that moment, drawing on past experiences . . . he did what he felt was reasonably necessary to get out of that situation." If Perez wanted a more specific instruction, it was incumbent upon him to ask for it. (*Garvin*, *supra*, 110 Cal.App.4th at p. 489 ['"[a] defendant who believes that an instruction requires clarification must request it"'].)

C. *No Ineffective Assistance of Counsel*

Perez contends that if the court had no sua sponte duty to give the additional antecedent assault instruction, his attorney was constitutionally ineffective for not asking that it be given. Perez states there was no tactical reason for counsel not to request the instruction because the antecedent threat instruction was "critical to the defense's theory of self-defense."

To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial. (*People v. Brown* (2014) 59 Cal.4th 86, 109.)

Perez's claim fails because he cannot establish that his trial attorney acted deficiently. Cases holding that a defendant is entitled to an instruction on antecedent threat or assault all involve antecedent threats or harm by the victim (here, L.R.) (e.g., *People v. Moore* (1954) 43 Cal.2d 517, 527-529; *People v. Pena* (1984) 151 Cal.App.3d 462, 475, 476-477, *People v. Bush* (1978) 84 Cal.App.3d 294, 302-304; *People v. Torres*

(1949) 94 Cal.App.2d 146, 151) *or* by third parties who the defendant reasonably associated with the victim. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1060, 1065-1067 (*Minifie*).)

None of the cases approve giving such instructions under the facts here—an antecedent assault by one person, and a subsequent (claimed) assault by a complete stranger having no association with the person who committed the prior assault. Indeed, this court considered this issue in *People v. Gonzales* (1992) 8 Cal.App.4th 1658 (*Gonzales*). There, police arranged controlled purchases of heroin from the defendant in his residence. After obtaining a search warrant, they gave notice of their intent to enter the residence and smashed the door open when they heard people running inside. (*Id*. at pp. 1660-1661.) When police entered, the defendant shot, wounding an officer. (*Ibid*.) To support a claim of self-defense, the defendant presented evidence that three days earlier men broke into his home and robbed him at gunpoint. (*Ibid*.) He requested a special instruction that is nearly identical to the one Perez claims should have been given here—stating that a person who has been previously assaulted by another is justified in '"acting more quickly and taking harsher measures for his own protection"' in the event of an actual or threatened assault than would a person who had not received such prior threats. (*Id*. at p. 1163.) We held that the trial court properly rejected that instruction because a person who has been previously assaulted is not justified in taking quicker and harsher measures for his or her own protection as to "*all the world*" than would a person who had not been so assaulted. (*Id*. at p. 1664).) Absent evidence that the defendant could reasonably associate the person committing the antecedent threat or assault with the

current victim, there is no basis for giving the "acting more quickly"/"taking harsher measures" instruction. (*Ibid*.)

Here, Perez was not entitled to antecedent assault instructions because there was no evidence of any association between the person who assaulted Perez in 2009 and L.R. (*Gonzales, supra*, 8 Cal.App.4th at p. 1664.) Accordingly, defense counsel did not render ineffective assistance by failing to request an instruction that was not warranted by the evidence. (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836.)

Disagreeing with this analysis, Perez cites *Minifie, supra*, 13 Cal.4th 1055, asserting that his confrontation with L.R. was much like, and thus closely associated with, the person who assaulted him in 2009. However, *Minifie* is materially distinguishable.

In *Minifie, supra*, 13 Cal.4th 1055, the defendant killed a person belonging to a family with a reputation for violence. (*Id*. at p. 1063.) After serving a sentence for that offense, the defendant was released from prison. (*Ibid*.) Later, he encountered a man in a bar who was a close friend of the person whom he had killed. When that man punched the defendant, the defendant shot him. (*Id*. at pp. 1060-1063.) In the defendant's trial for assault with a deadly weapon, to support a self-defense claim he offered evidence that he knew the victim was a close friend of the person he had previously killed, and family members of that victim had threatened defendant, and the victim himself had a reputation for violence. (*Id*. at pp. 1061-1063.) The court held such evidence was admissible to support a claim of self-defense because the threats were made by members of a group who defendant reasonably associated with the victim. (*Id*. at p. 1065.)

Unlike the situation in *Minifie, supra,* 13 Cal.4th 1055, Perez does not assert that any prior attack or threat involved anyone associated with L.R.—such as L.R.'s friends, L.R.'s family, L.R.'s allies, or L.R.'s cohorts. Although what is reasonable will vary according to the circumstances, the association addressed in *Minifie* is not one that exists solely in a defendant's mind due to a prior assault by a completely unrelated person. (*Gonzales, supra,* 8 Cal.App.4th at pp. 1660-1661.) Indeed, if Perez's contention were correct—that his personal trauma from a prior assault by a person unrelated to L.R. may be the basis of a self-defense claim—then Perez would be setting his own standard of conduct, establishing a purely subjective standard for self-defense. This is not the law. (*Ibid.*; see also *People v. Brady* (2018) 22 Cal.App.5th 1008, 1017 (*Brady*) [homeless person's "personal history of 'trauma, abuse, mental illness, and physical limitations' is not folded into the objective prong of a self-defense claim"].)

In any event, even assuming without deciding that counsel was deficient in failing to request the additional antecedent threat instruction, there is no prejudice. The defense attorney and the prosecutor thoroughly addressed this subject in argument, and the antecedent assault theory was the dominant defense theme from opening statement through closing argument. For example, in his opening statement, Perez's lawyer told the jury that "something very similar" had happened to Perez "while he'd been panhandling in the past." He also told the jury in opening statement, "Perez, in the past, had been assaulted by somebody and hurt. Being in the situation again . . . he did what he felt was necessary to defend himself . . . ." Perez's lawyer focused his closing argument on this same theme, telling the jury that "it was reasonable" for Perez to fear L.R. because Perez

"had been assaulted previously while panhandling . . . ." Perez's lawyer told the jury, "[Y]ou have to consider all the circumstances that were known to [Perez]" and "consider what a reasonable person in his similar situation and similar knowledge would have believed." Defense counsel argued that Perez had been assaulted in 2009 by a "young man" who "had taken offense to him panhandling, it was a vicious assault . . . . And that event was in [Perez's] mind" and Perez "didn't want to end up in that situation again."

Additionally, the court instructed the jury to "consider all the circumstances as they were known to and appeared to [Perez] and consider what a reasonable person in a similar situation with similar knowledge would have believed." And, the court instructed: "If you find that [Perez] received a threat from someone else that he reasonably associated with [L.R.], you may consider that threat in deciding whether [Perez] was justified in acting in self defense."

Thus, the instructions given, combined with Perez's testimony and his attorney's opening statement and closing arguments, adequately informed the jury that if Perez could reasonably associate the prior assault with L.R., the jury could consider Perez's previous encounter with the unidentified 2009 attacker in deciding whether Perez acted in self-defense. On this record, it is inconceivable that the jury hearing the evidence, the instructions given, and counsels' arguments would have failed to give Perez's antecedent-assault theory full consideration. (*Gonzales*, *supra*, 8 Cal.App.4th at p. 1665.) Accordingly, Perez was not prejudiced by his trial attorney's failure to request the additional instruction. (See *People v. Smithey* (1999) 20 Cal.4th 936, 986-987 [counsel's failure to request pinpoint instruction not prejudicial because the instructions as a whole,

taken together with trial evidence and counsel's closing argument, adequately informed the jury they could consider evidence in the very manner that a pinpoint instruction would have provided].)[4]

II. *THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING PEREZ'S* ROMERO *MOTION*

A. *Additional Factual Background*

Before sentencing, Perez filed a motion to strike two prior convictions under *Romero, supra,* 13 Cal.4th 497: (1) A 2009 conviction for first degree burglary and (2) a 2010 conviction for robbery. Citing California Rules of Court,[5] rule 4.423(b)(2), Perez's primary argument was that his "criminal conduct is at least partially excusable" due to "numerous mental health issues throughout his life . . . ."[6] Perez explained that he had been diagnosed with attention deficit/hyperactivity disorder, psychotic disorder, bipolar disorder, schizophrenia, and "[l]ow I.Q." He stated that his "lifelong struggle with mental illness" began at age six, and his condition worsened as he aged. Perez twice attempted

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4 Perez cites *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732 to support his claim that the asserted error is prejudicial. However, *Sotelo-Urena* is inapposite because there the defendant was previously attacked by the same victim (*id.* at pp. 738, 741), whereas here there is no evidence of any relationship between the person assaulting Perez in 2009 and L.R. Moreover, *Sotelo-Urena* is best understood as providing that the reasonable person standard takes into account a defendant's knowledge that may increase his or her ability to *accurately* predict impending violence. (*Brady*, *supra*, 22 Cal.App.5th at p. 1017.) Here, however, Perez's contention is that the effects of the 2009 assault increased his propensity to *misperceive* that L.R. was a threat.

5 Undesignated references to rules are to the Rules of Court.

6 Rule 4.423(b)(2) provides that circumstances in mitigation include that "[t]he defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime."

suicide, once at age 10, and again at age 13. As an adult, he "continued to suffer from auditory hallucinations and engage in self-mutilation." In 2009, Perez received mental health treatment while he was incarcerated, and in 2012 he was diagnosed with bipolar disorder.

Perez attached excerpts of his mental health records to his motion. These records showed that at age 13, Perez was reported to have a psychotic and schizoaffective disorder. At age 19 Perez was diagnosed with schizophrenia. Records from 2010 documented his complaints of hearing "voices all the time" and showed he was diagnosed with psychotic disorder. In 2014 a clinical psychologist diagnosed Perez as having bipolar disorder with opioid dependence in early remission and a history of substance abuse.

Perez submitted several letters from family members. Perez's father wrote, "I know in my heart [that Perez] is ready to change and start a new life," and promised "that I will do everything in my power to help him be a good man and a productive member of society." Other family members submitted letters to the same effect. Perez's mother wrote that she would employ him in her flower shop when he is released from custody.

The People filed opposition, noting that Perez's 2009 burglary conviction resulted from a guilty plea after Perez was apprehended walking away from a residence with a bag full of stolen property. Perez had met the victim two weeks before, had stayed as a guest in the home, and knew that the victim would be away when he broke into the home to steal.

Perez's 2010 conviction for robbery was strikingly similar to the instant offenses—Perez asked a victim for money, and when the victim refused, Perez attacked him, ultimately rendering the victim unconscious. When apprehended, Perez told police that the victim was the aggressor and that he acted in self-defense.

The People stated that Perez "does not point out any particular conduct on any of the three strike convictions that indicate his mental state played a role in the crimes. On the contrary, all three crimes indicate [that Perez] knew exactly what he was doing." For example, in the burglary, Perez knew the victim was not going to be home and took advantage of him while he was away. In the 2010 robbery, Perez "was competent enough to know to ask for money" and, when the victim refused, Perez beat him into unconsciousness and then fled and fabricated a self-defense story. In the current conviction, again Perez demanded money and, when the victim refused, Perez attacked him. Like the 2010 robbery, Perez again falsely stated that the victim was the aggressor. The People concluded:

> "There has been no evidence whatsoever that a mental condition led to the crimes being committed. Rather, [the] defense is merely providing mental health records, which do not show whether or not they played a role in any of the crimes."

Additionally, the People noted that Perez's performance on probation has been unsatisfactory. Perez was convicted in 2007 for violating section 647, subdivision (h) (loitering) and was placed on three years of probation. Within three months, Perez was convicted of possessing a switchblade and resisting a peace officer and was again placed on three years of probation. Within that probationary period, Perez was convicted of the

residential burglary and sentenced to a two-year prison term. After his release, Perez was convicted of robbery slightly more than a year later and sentenced to a four-year prison term. Perez was on parole when he committed the instant offenses.

Several members of Perez's family addressed the court at the hearing. Perez's father stated there is a family history of schizophrenia. He stated that Perez is "not a violent person," but rather is "humble," and he promised to employ Perez and "show him how to be a productive member of society." Perez's aunt, who also suffers from schizophrenia, told the court that she has benefited from behavioral health treatment and Perez would too if given the opportunity. Perez's mother stated that she would "make sure" that Perez gets treatment.

Perez apologized to L.R. and told the court that he had been taking his prescribed medication and, if given the chance, would "redeem" himself.

At the hearing, the court stated that he had read "all of the records" attached to Perez's motion and had "great empathy" for Perez. Recognizing Perez's history of mental illness, the court stated:

> "I have great empathy for your suffering of mental conditions for which there may be some treatment and that you had received medical treatment and medication over time . . . . I looked at the prison records where you were being treated there as well.
>
> "And it is unfortunate in our society that we cannot better manage these situations for people such as yourself. It makes it difficult for people in my position to look at these situations."

Later at the hearing, the court again stated on the record that he had considered Perez's mental illness as a mitigating factor:

> "There is evidence that you do suffer from some mental condition, which could reduce culpability for the crime. I understand that."

In balancing and weighing numerous factors, the court stated that one consideration was whether Perez was a "passive participant" in the crimes—and that Perez was not. The court noted that in the 2010 robbery, Perez "beat a man half to death . . . ." And in the instant case, Perez "sliced a man in his neck with a box cutter, and he could easily have died." The court also considered that Perez initiated and was the aggressor in the home burglary, the 2010 robbery, "as well as here." Additionally, the court considered that there was "no indication of provocation" in any of the three cases.

The court noted that Perez was suffering from "compromised judgment because of [his] [mental] condition"—however, the court also considered that "there was no evidence of coercion or duress." The court considered whether Perez was induced by others to participate in any of the crimes, but found no such evidence. The court also noted that Perez did not exercise caution to avoid injury; to the contrary, "there was serious injury to the victims." The court recognized there was evidence Perez committed the crimes "to provide necessities" for himself because he was homeless. The court commented that none of the victims had abused Perez; rather, they were strangers.

The court also considered the statements made by Perez's family members. The court told Perez, "I wish you had these people here for you . . . sooner. I wish they were here last time . . . after the burglary and that you had that support network there for you. And I'm not sure if it would be successful now. [¶] They were here when this all happened, and nothing was being done to help you until it's the point of being too late."

The court expressed "hope" that in prison Perez would receive medication and counseling, and denied the motion.

B. *Perez's Contention and Analysis*

Perez contends the court abused its discretion by failing to adequately consider that his mental disorders reduced his culpability. Perez contends there was "sufficient evidence" showing that his mental disorders were causally related to his committing these offenses.

Sentencing courts have the discretion to strike a criminal defendant's strike priors when doing so would be in the interest of justice. (§ 1385; *Romero, supra,* 13 Cal.4th at pp. 504, 530-531.) In exercising its discretion, the trial court must consider and weigh all relevant factors. (*In re Saldana* (1997) 57 Cal.App.4th 620, 626.) In particular, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strike law's] spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review the court's ruling on a *Romero* motion under the "deferential abuse of discretion" standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) Dismissal of a strike is a departure from the sentencing norm. Therefore, in reviewing a *Romero* decision, we will not reverse for abuse of discretion unless the defendant shows the decision was "so irrational or arbitrary that no reasonable person could agree with it."

(*Carmony*, at p. 377.) Reversal is justified where the trial court was unaware of its discretion to strike a prior strike or refused to do so for impermissible reasons. (*Id*. at p. 378.) But where the trial court, aware of its discretion, "'balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance.'" (*Ibid*.)

A mental condition that significantly reduces culpability for a crime is a mitigating factor (rule 4.423(b)), and Perez's mental illness was a factor pertaining to his background, the nature and circumstances of the current and prior offenses, and society's interests that the trial court should have considered in deciding whether to vacate some or all of the strike findings. However, contrary to Perez's assertions, the record shows that the trial court properly considered Perez's mental health issues. For example, the court stated that it had "reviewed all" of the mental health records attached to Perez's motion. The court told Perez, "There is evidence that do you suffer from some mental condition, which could reduce culpability for the crime. *I understand that*." (Italics added.) The court also stated that it had reviewed the probation officer's report. That report describes some of Perez's mental health issues, including that he failed to take prescribed medication and has auditory hallucinations. The court also listened to counsels' arguments and considered the relevant factors, stating, "I have to look at the Rules of Court . . . . And . . . [r]ule 4.423 . . . listed . . . by your attorney . . . . So I have to look at that."

Mental illness, though a relevant consideration, does not require a trial court to dismiss a strike. The record affirmatively demonstrates that the court considered Perez's

mental illness, but found that factor outweighed by numerous other facts demonstrating that Perez should be sentenced under the Three Strikes law. The court did not abuse its discretion. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 992-993 [court did not abuse its discretion in denying *Romero* motion, even where the defendant had significant mental health issues].)

III. *SENTENCING ISSUES*

A. *Failure to Sentence on Counts 2 and 3*

Although the jury convicted Perez on all three counts, the abstract of judgment only shows Perez's conviction for count 1—assault with a deadly weapon. Moreover, the court did not explain the basis for imposing a 25-year to life sentence, but simply stated, "[T]he defendant is sentenced to the state prison to [an] indeterminate term of 25 years to life pursuant to . . . section 1170.12[, subdivision] (c)." The clerk's minutes also do not identify the count(s) upon which the court imposed sentence. It is unclear from the record whether the court imposed the 25 year-to-life sentence for count 1 or count 2, or both, determining the sentences to run concurrently. There is no indication in the record that the court considered whether section 654 applies in this case and, if so, whether to impose and then stay execution of such sentence on any of the counts. (See *People v. Duff* (2010) 50 Cal.4th 787, 796 (*Duff*).)[7] If the abstract of judgment accurately reflects the court's oral pronouncement of sentence, then the court failed to sentence Perez on counts 2 and 3. The record does not indicate any sentencing at all as to count 3.

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7 We express no opinion on the resolution of any section 654 issue.

Because the parties did not raise any of these issues, we asked for supplemental briefing addressing whether the matter should be remanded for resentencing. The Attorney General contends that the abstract of judgment is inconsistent with the jury's three guilty verdicts. Additionally, the Attorney General asserts although an indeterminate sentence of 25 years to life is appropriate for either the assault with a deadly weapon or the robbery count, the oral pronouncement of sentence is deficient because the court did not state which count it was sentencing. Accordingly, the Attorney General concludes the matter must be remanded so the court may impose sentence on the remaining felony count as well as sentence for the misdemeanor (count 3), after which the clerk should prepare a new abstract of judgment, consistent with resentencing.

In contrast, asserting that the assault with a deadly weapon and robbery were committed on the same occasion and arose from the same operative facts, Perez contends the court had discretion to impose concurrent 25-year-to-life terms on either conviction. Perez further contends that where, as here, the judgment is silent as to how sentences are to run, under section 669 they are concurrent by operation of law. Accordingly, Perez contends that despite the silent record, the trial court "properly imposed by operation of law a concurrent 25 year to life indeterminate term on the second degree robbery conviction," and there is merely a "clerical error" in the abstract of judgment that may be corrected on appeal. Alternatively, Perez contends the matter should be remanded for resentencing, with directions that the trial impose concurrent 25-year-to-life sentences.

The court erred in failing to impose sentence on each of the three counts. """Upon conviction it is the duty of the court to pass sentence on the defendant and impose the

punishment prescribed. [Citations]. Pursuant to this duty the court must either sentence the defendant or grant probation in a lawful manner; it has no other discretion."'" (*Duff*, *supra*, 50 Cal.4th at pp. 795-796.)

We reject Perez's argument that section 669 operates as a matter of law in this case to require concurrent sentences on counts 1 and 2. Perez is correct that sentences are deemed to run concurrently by operation of law when a trial court fails to state how sentences are to run. (§ 669, subd. (b).)[8] However, that default rule only applies where

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8 Section 669 provides in part: "(a) When a person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. Life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or with any other term of imprisonment for a felony conviction. Whenever a person is committed to prison on a life sentence which is ordered to run consecutive to any determinate term of imprisonment, the determinate term of imprisonment shall be served first and no part thereof shall be credited toward the person's eligibility for parole as calculated pursuant to Section 3046 or pursuant to any other section of law that establishes a minimum period of confinement under the life sentence before eligibility for parole. [¶] (b) In the event that the court at the time of pronouncing the second or other judgment upon that person had no knowledge of a prior existing judgment or judgments, or having knowledge, fails to determine how the terms of imprisonment shall run in relation to each other, then, upon that failure to determine, or upon that prior judgment or judgments being brought to the attention of the court at any time prior to the expiration of 60 days from and after the actual commencement of imprisonment upon the second or other subsequent judgments, the court shall, in the absence of the defendant and within 60 days of the notice, determine how the term of imprisonment upon the second or other subsequent judgment shall run with reference to the prior incompleted term or terms of imprisonment. Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently."

the court, "at the time of pronouncing the second . . . judgment . . . fails to determine how the terms of imprisonment shall run in relation to each other . . . ." (§ 669, subd. (b).) Section 669 does not apply here because the court did not "pronounc[e] the second . . . judgment." (§ 669, subd. (b)) and there is no "second . . . judgment upon which sentence is ordered to be executed." (§ 669, subd. (a).) The record is not merely silent as to whether multiple sentences that the court pronounced were to run consecutive or concurrent (which would invoke section 669)—rather, the court did not pronounce any judgment whatsoever on two of the three counts upon which the jury convicted Perez.

Disagreeing with this conclusion, Perez cites *People v. Reed* (1966) 241 Cal.App.2d 102, *People v. Bruner* (1995) 9 Cal.4th 1178, and *People v. Lyons* (1999) 72 Cal.App.4th 1224. However, in each of those cases, the court sentenced on all counts and, therefore, the cases do not apply where, as here, the court completely failed to sentence on two of three counts. For example, in *Reed*, the defendant was convicted on two counts, and the court sentenced "for the term prescribed by law, on said [c]ounts." (*Reed*, at p. 103.) Because the trial court did not specify whether the sentences ran consecutively, under section 669 they were deemed to run concurrently. (*Reed*, at p. 108.) In *Bruner*, on parole after serving a prison term for armed robbery, the defendant was arrested for a drug offense. (*Bruner*, at p. 1181.) The court revoked parole and imposed a prison term. While serving that sentence, the defendant pled guilty to the drug offense, and the count sentenced him to 16 months for the drug offense. (*Ibid.*) Because the trial court failed to specify whether the new term would be concurrent with, or consecutive to, the revocation term, it was deemed to be concurrent under section 669.

(*Bruner*, at pp. 1181-1182.) Perez cites *Lyons* for the proposition that "when the indeterminate terms are imposed consecutively (as was done there) the sentencing is controlled by sections 1168, subdivision (b), and 669, as well as [rule 4.451(a)]." (Italics omitted.) *Lyons* is inapposite because here the trial court did not impose multiple terms, but rather only a single prison term, having failed to sentence at all on two counts.

By failing to specify the count upon which the court was imposing the 25-year-to-life sentence, the trial court did not clearly pronounce the sentence it intended to impose. Moreover, the court compounded its error by failing to sentence at all on the two remaining counts upon which Perez was convicted. In his supplemental brief, Perez concedes that "the trial court had the *discretion* to impose a concurrent 25 year to life term on either the assault with a deadly weapon or second degree robbery conviction." (Italics added.) Of course, implicit in Perez's assertion that the court had discretion to sentence concurrently is that the court likewise had discretion to sentence consecutively. (See *People v. Torres* (2018) 23 Cal.App.5th 185, 198-199 (*Torres*) ["courts have discretion to impose consecutive or concurrent sentences for same occurrence/same operative facts serious and/or violent felony convictions provided consecutive sentences are not required 'under a statute other than the three strikes law'"].)[9] Accordingly, we

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9 We express no opinion on whether (1) whether Perez's convictions in this case were committed on the same occasion and/or arise from the same set of operative facts, (2) the court should sentence the assault and robbery convictions concurrently or consecutively, and (3) any sentence(s) should be stayed under section 654. These determinations are for the trial court in the first instance. (See *Torres*, *supra*, 23 Cal.App.5th at pp. 203-204.)

will reverse Perez's sentence and direct the trial court to resentence Perez. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 509 [reversal of sentencing order is appropriate remedy where trial court's error may affect a discretionary sentencing decision].)

B. *Failure to Impose Mandatory Enhancements*

The trial court found that in April 2009 Perez suffered a conviction for first degree burglary, and in September 2010 was convicted of second degree burglary. At the time of sentencing (October 2017), the court was required to impose a five-year consecutive term for each of these prior serious felony enhancements under section 667, subdivision (a)(1), and the court had no discretion to strike or dismiss such a conviction for purposes of this enhancement. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) However, the court failed to sentence Perez to either of these five-year enhancements.

Because the Attorney General failed to raise this issue in its principal brief, we asked the parties to file supplemental briefs addressing (1) whether by failing to impose these sentencing enhancements, the court rendered an unauthorized sentence; and (2) if so, what is the appropriate disposition in light of Senate Bill No. 1393, effective January 1, 2019, which amends sections 667 and 1385 to give the trial court discretion to dismiss, in the interest of justice, five-year prior serious felony enhancements under section 667, subdivision (a)(1).

Perez's supplemental brief correctly notes that on both counts 1 and 2, the information pleaded the two prior convictions solely for purposes of the three strikes law. The information did not allege, either in so many words or by citing a relevant statute, a prior serious felony conviction enhancement. Perez correctly asserts that under *People v.*

Nguyen (2017) 18 Cal.App.5th 260, "when, as here, the People allege a prior serious felony conviction, and when they cite the three strikes law but do not cite the prior serious felony conviction statute, we can only conclude that they have made 'a discretionary charging decision.'" (*Id.* at p. 267, italics omitted.) Accordingly, the court did not err in failing to impose five-year enhancements under section 667, subdivision (a)(1). (*Nguyen*, *supra*, 18 Cal.App.5th at p. 263.)

DISPOSITION

The judgment of conviction is affirmed. Perez's sentence is vacated and the matter is remanded for resentencing. At resentencing, the court is directed to (1) impose sentence on each count upon which Perez was convicted, (2) exercise its discretion in determining whether such sentences run consecutively or concurrently, and (3) determine whether any sentence is stayed under section 654. Upon resentencing, the clerk shall prepare a new abstract of judgment that conforms to the court's oral pronouncement of

judgment at the resentencing hearing and shall forward a certified copy of the abstract of judgment to the Department of Corrections and Rehabilitation.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.